This chapter will discuss; surface waters, flood waters and stream drainage; the rights landowners have to protect themselves from these types of water; and what rights and liabilities exist with respect to diversion of these waters.

The surveyor is not expected to become an expert in drainage law, but in the course of topographic and boundary surveys the surveyor is most likely to encounter situations whereby drainage law applies. The surveyor is cautioned to not make legal drainage decisions, but merely gather facts and evidence as it may relate to situations ultimately depending upon a drainage law decision. The surveyor may point out a potential problem and advise the client to seek legal advise.

DEFINITIONS

The Arizona case of Southern Pacific Company v. Clotilda Proebstel, 61 Ariz. 412, 150 P.2d. 81, has quoted from other sources, definitions of "surface water", "flood waters", and "stream water". These definitions are as follows:

"Surface waters are defined as waters falling upon and naturally spreading over lands. They may come from seasonal rains, melting snows, swamps or springs, or from all of them. Surface waters consist of surface drainage falling on or flowing from and over a tract or tracts of land before such waters have found their way into a natural watercourse."

"A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear....Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters....As we have observed, a continous flow of water is not necessary to constitute a stream and its waters stream waters...."

"Flood waters are distinguished from surface waters by the fact that the former have broken away from a stream, while the latter have not yet become part of a watercourse. The term 'flood waters' is used to indicate waters which escape from a watercourse in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not effect their character as flood waters or give to the course which they follow the character of a natural watercourse."

damnum absque injuria - in the legal sense this term refers to harm, injury, or damage as a result of a breach of duty, that is not recoverable. In other words, being in the wrong, but not liable for damages.

It is important to note that the case of the Gillespie Land and Irrigation Company v. Gonzalaz, 93 Ariz. 152, 379 P.2d. 135 and the case of Schlecht v. Schiel, 76 Ariz. 214, 262 P.2d.252 both cite the case of Southern Pacific Company v. Proebstel (supra) when discussing "flood waters". The case of Gillespie Land and Irrigation Company v. Gonzalaz also cites from the case of Costello v. Bowen, 80 Cal. App. 2d. 621, 182 P.2d. 615, as follows:

"....flood waters in the strict sense, that is, waters escaping because of their height from the confinement of a stream and running over adjacent property....they are flood waters because of their escape from the usual channels under conditions which do not ordinarily occur."

The case of Gillespie v. Gonzalaz further states:

"It is throughly settled that flood waters escaping from a stream are not surface waters and do not lose their character as flood waters while flowing wild over the country."

The court then quotes from Horton v. Goodenough, 184 Cal. 451, 194 P. 34, 37 as follows:

"....The waters are plainly flood waters breaking out of their channel and running wild....". (underlines added for emphasis).

It appears Arizona law suggests that when "flood waters" break out of a defined channel they are not considered "surface waters". It is important to be able to distinguish "flood waters" from "surface waters" as the rights associated with diverting each and protecting one's land from each will vary.

SURFACE WATERS

There are two separate and distinct doctrines that apply to "surface waters". These doctrines are the civil law and common-law rules. Arizona courts acknowledge both and have recited the principles of each. The case of Kroeger v. Twin Buttes Railroad Company, 14 Ariz. 269, 127 P. 735 outlines these doctrines as follows:

"In this respect the civil and common law are different, and the rules of the two have been recognized in different states of the Union- some accepting the doctrine of the civil law, that the lower premises are subservient to the higher, and that the latter have a qualified easement in respect to the former, an easement which gives the right to discharge all surface water upon them. The doctrine of the common law, on the other hand, is the reverse, that the lower owner owes no duty to the upper land owner, that each may appropiate all the surface water that falls upon his own premises, and that the one is under no obligation to receive from the other the flow of any surface water, but may, in the ordinary prosecution of his business and in the improvement of his premises by embankment or otherwise, prevent any portion of the surface water coming from such upper premises."

The case of the Roosevelt Irrigation District v. Beardsley, 36 Ariz. 65, 282 P. 937, also similarily outlined the two doctrines, but further stated:

"....and where it prevails the lower owes no duty to the higher estate relative to surface water, because it is regarded as a common enemy against which anyone may defend, even to the extent of causing injury to another in doing so. Damage resulting from such acts is damnum absque injuria."

The doctrine accepted by the Arizona courts is that of the common-law. This is evidenced by the case of Gibson v. Duncan, 17 Ariz. 329, 152 P. 856, which stated as follows:

"The complaint seems to be drawn upon the idea that, inasmuch as the defendant's premises were lower than the plaintiff's, a duty was imposed by law upon the lower premises to permit the flow of surface and flood waters over the same. In other words, the plaintiff would adopt the civil law which recognized the dominant and servient estates with reference to surface waters. We do not think that to be the law of this state. On the contrary...". And the court went on to quote the rules of the common-law doctrine. (underlines added for emphasis).

Other cases mentioned herein cite the common law doctrine as controlling.

At this point it appears that under the common-law doctrine accepted by the Arizona courts, a landowner could do about anything to divert surface waters from his own land. This is not entirely true. There are certain limitations to the rule. Arizona courts have modified the common law rule as illustrated next:

Roosevelt Irrigation District v. Beardsley, supra, cites from other authorities:

"The common law, it is true, has been adopted in this state but in a greatly restricted sense....and the rule of that law--that one may adopt any means he may choose to prevent surface waters from comming on his premises without regard to the injury it may cause others--has been modified by many of the states....for under the authorities, those that follow the common as well as those that accept the civil law, "the rule is universally recognized ,"...."that a land owner has no right to collect surface water in an artificial channel, and discharge it in large quantities upon the land of a lower owner to his damage." "

"It is the rule of both the civil and common law, and universally recognized, that a land owner has no right to collect surface water in an artificial channel and discharge it in large quantities upon the lands of an adjoining owner to his damage." Kroeger v. Twin Buttes Railroad Company, supra (and as quoted from other authorities).

The case of City of Tucson v. Dunseath, 15 Ariz. 355, 139 P. 177 stated:

"It seems to us that the extent to which the common law is thus modified is well expressed in the case of O'Brien v. St Paul, 25 Minn. 335, 33 Am. Rep. 470, where it said: 'It [surface water] has been called a common ememy, which each owner may get rid of as best he may....This right, however, is somewhat restricted by the maxim that "a man must so use his own as not unnecessiarily to do injury to another,".... 'Although we are not prepared to say that in no case can an owner lawfully improve his own land in such a way as to cause the surface waters to flow off in streams upon the land of another, we do not hesitate to say that he may not turn the water, in destructive currents, upon the adjoining land....'.... It gives each man the common-law right to improve and enjoy his own property to its fullest extent, but limited by the requirement that he use reasonable care in disposing of surface water, which the common law did not always require him to do." (underlines added for emphasis).

The case of City of Tucson v. Kroeger, 82 Ariz. 347, 313 P.2d. 411, discusses a situation whereby surface water was backed up as the result of inadequate culverts installed in an arroyo by the City of Tucson. The discussion of the case was as follows:

"First, it is urged that the evidence shows that surface waters running down Park Avenue originally entered plaintiff's building from the front. However, the evidence also establishes that this water normally would have passed into this arroyo through outlets provided in the street draining into the culverts. When the culverts filled to capacity, the surface water could not,

therefore, escape into the culverts and it collected in the street until ultimately entering plaintiff's building. It is the rule of this jurisdiction that one may not collect surface water and discharge it in unnnatural quantities on the land of another." (underlines added for emphasis).

The Southern Pacific Company v. Proebstel case quotes from Horton v. Goodenough as follows:

"...First, one has no right to obstruct the flow onto his land of what are technically known as surface waters." (underline added for emphasis).

And finally the case of Southern Pacific Company v. Proebstel, supra, stated:

"Insofar as the water law of Arizona is concerned, the prohibitions found in the cases adjudicated are against: a. The obstruction of surface waters without providing sufficient outlet and, b. The accumulation of surface waters in large quantities, followed by its conduct through an artificial ditch in a direction where it never flowed to ultimate discharge upon the land of another."

The court in City of Tucson v. Dunseath, supra, did go on further to apply the previous limitation to a city or town as shown next:

"Cities and towns have no greater rights than individuals to collect in artificial channels, upon their streets and highways, mere surface waters, distributed in rain and snow over large districts, and precipitate it upon the premises of private owners.... A municipal corporation is liable for throwing water, collected in large quantities in a street, or in a gutter of a street, upon the land of a private owner."

Close review of the City of Tucson v. Dunseath case will show that the city dumped waste material in a street which damned up a ditch in the road that was constructed by Dunseath, an adjoining lot owner, to dispose of the same surface water on his lot. This dam backed the water up and "cast" it upon the lot of Dunseath. The ditch constructed by Dunseath had been used as disposal for surface waters from his lot for about ten months prior to the city dumping the dirt. The court held that use of the ditch by Dunseath for the ten months created an acquiescence by the city whereby they now could not collect the water and cast it back upon the land of an adjoiner. The court did say that they could have raised the grade of the roadway for improvements. A very interesting dissenting opinion was offered by Justice Cunningham. This case is included in this chapter for review.

In summary it appears that surface water is a common enemy. Landowners may divert it so long as they use reasonable care and in a manner that will not cause repeated damage to an adjoiner. This diversion must not be by means of an artificial channel that will cast waters in large quantities upon an adjoiner. An example might be construction of a detention pond and releasing water into an existing swale at higher quantities than the historic rate. It is also important to make every reasonable effort to not dam up a natural drainageway so as to cast the water upon an adjoiner. An exception to this is found in the case of Gibson v. Duncan, supra, which is included in this chapter for review. The facts of the case are that the higher estate, plaintiff, had a stable and horse lot. Surface waters passed over this land and onto the lot of the defendant, carrying "manure and other filth" to thereby be deposited. The defendant constructed an embankment to prevent these filthy surface waters from passing onto his property. The water backed up onto the plaintiff's property. The court ruled in favor of the defendant which in this case was the lower landowner. The court based its opinion, at least in part, on the fact that the plaintiff was not free from fault, as it was his stable and horse lot which generated the "manure and other filth". This reasoning may apply in today's time to leakage of fluids, wastes, garbage, or any unhealthy, unsightly or dangerous materials.

Another important consideration is that the application of the common-law doctrine does not establish any natural drainage easements inherient with the lower lands but, it is clear that diversion of surface waters could create situations impending on the rights of others. Construction of ditches, channels, dams, embankments, and culverts all could establish conditions which violate the provisions of the modified common-law doctrine as applied in Arizona. Coupled with long use (or in the case of City of Tucson v. Dunseath, only ten months) by artificially diverted surface waters can certainly create a situation of a prescriptive drainage easement or create one by acquiescence. It is for this reason that the surveyor must be aware of conditions which may give rise to establishing an unwritten drainage easement. Usually, the surveyor is one of few people to ever view the land first hand. During the course of the survey, the surveyor should look at the drainage conditions on and around the site, locating structures, channels or anything that may appear to be a factor in evaluating a drainage problem. If the survey is a topographic survey to be used for development, the surveyor should be extra careful, maintaining good accuracy and careful not to miss any drainage features.

FLOOD WATERS

Arizona courts recognize common law principles with regards to flood waters. It is well settled that "flood waters" are a common enemy and a landowner can construct embankments, dikes, channels or other structures to prevent damage by flood waters.

The case of Southern Pacific Company v. Proebstel, supra, cites Horton v. Goodenough, supra, as follows:

"....The waters are plainly flood waters breaking out of their channel and running wild, and as such each property owner threatened has the right to protect himself against them as best he can, under the authority of the decisions we have already cited, the most notable of which is Lamb v. Reclamation District, supra (73 Cal. [125] 126, 14 Pac. 625, 2 Am. St. Rep. 775). The waters are not surface waters in the technical sense, for they have already been gathered into a stream whence they have escaped."

The same case further addressed the right to protect against flood waters as follows:

"....one has the right to protect himself against 'flood waters,' that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another."

Finally in the case of Southern Pacific Company v. Proebstel, the court stated:

"It [defendant] has protected itself and prevented invasion of its premises of the flood waters of the stream. If, thereby, the waters which are turned back and prevented from flooding over its right of way damage the lands of the plaintiff, the case is one of damnum absque injuria. Defendant has done nothing further than to exercise its common law right of protection against flood waters." [defendant] added for clarification.

The means by which a landowner can protect themself from flood waters is quite flexible. The most common form of protection is of course an embankment of some type. The case of Southern Pacific Company v. Proebstel stated :

"On the proposition of law that one whose property is threatened to be invaded by flood can defend against it by the use of ditch or dike....".

There are limitations on being able to do anything to protect one's land from flood waters. The case of Kennecott Copper Corporation v. McDowell, 100 Ariz. 276, 413 P.2d. 749 addresses this as follows:

".....since the privilege to embank against flood waters is qualified to the extent that an owner of land subject to overflow of flood waters who undertakes protective measures may not obstruct the flow of a natural water course." (other cases cited).

And from the case of Gillespie Land and Irrigation Company v. Gonzalaz, supra:

"We agree that a landowner is not responsible for his diversion of or his failure to carry away flood waters, unless some other act contributes to their destructive effect." (underlines added for emphasis).

What "other acts" which may contribute to a "destructive effect" can certainly vary from case to case.

Also from the Gillespie case the court quoted from Costello v. Bowen, 80 Cal.App.2d. 621, 182 P.2d. 615, 620, as follows:

"But the drastic rule which allows a property owner to divert such waters to the lands of others only applies to flood waters in the strict sense, that is, waters escaping because of their height from the confinement of a stream and running over adjacent property. Implicit in the definition of flood waters is the element of abnormality; they are flood waters because of their escape from the usual channels under conditions which do not ordinarily occur." (underlines added for emphasis).

STREAMS

The most often asked question is where the line is drawn when determining whether a watercourse is a stream or just a large swale, gully or depression? The definition of a stream, supra, must be strictly interpreted. The case of Southern Pacific Company v. Proebstel, supra, quoting from Horton v. Goodenough, supra, suggests that certain topographic features are not streams:

"....a 'watercourse' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks....". (underlines added for emphasis).

And in Roosevelt Irrigation District v. Beardsley, supra, the court stated:

"The water in question drains through washes, gullies and arroyos, and is therefore merely surface water....".

However, in the case of Diedrich v. Farnsworth, 3 Ariz. App. 264, 413 P.2d. 774, the court quoted from City of Globe v. Shute, 22 Ariz. 280, 196 P. 1024 (1921) as follows:

"We find no difficulty in holding that a ravine or wash is a 'natural stream' or 'water course,' in the sense of the law, where the rains or snows falling on the adjacent hills run down the ravine or wash in a well-defined channel at irregular intervals." (underlines added for emphasis).

It is important to distinguish a stream from a low depression, swale or gully. The waters in swales, low depressions and some washes or gullies would fall under the laws of surface waters. Some washes, ravines or gullies may fall under the definition of a stream, ones that have a well defined channel. Different case law applies to the obstruction of stream waters. As will be shown, streams cannot be altered or restricted in a way that will cause damage to another's property. In addition to the case law that exists, most work done in and around streams require special permits from the Corps of Engineers.

As mentioned in the previous section on flood waters, the Kennecott Copper Corporation v. McDowell quoted from other cases that to protect against flood waters one cannot "obstruct the flow of a natural watercourse." It is from this that the court in the Kennecott case directed the jury as follows:

" "In this case the issues to be determined by you are these:

"First, Did defendant divert a natural water course?

"If your answer to that question is 'No,' you will return a verdict for the defendant." "

From this it is clear that diversion of the natural water course would have created a situation where the defendant would be held liable.

The case of Schlecht v. Schiel, supra, states:

"An action for damages will lie upon these simple facts. Whatever one may do with surface waters, or with flood waters, as these terms are defined in Southern Pacific Company v. Proebstel, 61 Ariz. 412, 150 P.2d. 81, he may not cast the natural flow of a stream onto the land of his neighbor who is under no duty or obligation to receive the same." (underlines added for emphasis).

The Gillespie Land and Irrigation Company v. Gonzalaz, supra, states:

"....one who alters a natural watercourse will be liable "* * * for its inadequacy to carry away waters ordinarily coming into it, both the natural and normal flow and such abnormal and excessive flow as may be reasonably anticipated....".

And the Gillespie case states:

"Unless some other basis of liability appears, the defendant is not liable for any failure of the flume to carry away more water than the natural capacity of the watercourse which flows into it."

And finally the Gillespie case states:

"A landowner may not divert the natural waters of a stream in such a manner that these waters, combined with flood waters, cause damage to his neighbor....". The case of Diedrich v. Farnsworth, supra, quotes this same statement from the Gillespie case.

So far we can see that one cannot restrict the natural flow of or divert a stream to the damage of others. A landowner may however, change the location of a stream on his own property (subject to any required permits) as evidenced by Diedrich v. Farnsworth, supra, where the court quoted from 56 Am. Jur., Waters, section 14, p. 504 (1947) as follows:

"There can be no doubt as to the right of a landowner to divert or change the course of a stream flowing through his land, provided he returns it to its original or natural channel before it reaches the land of the lower owner."

THE ROLE OF THE SURVEYOR

Many of the cases examined included exhibits and testimony by civil engineers which had done surveys of the property lines and drainageways. Usually, the surveyor (or engineer) would be called upon to testify as an 'expert witness'. However, there are instances where the surveyor may be called upon to defend his work. Suppose that during the course of a boundary or ALTA survey the surveyor discovers a situation that clearly represents a drainage rights problem. Failure to locate a structure, apparent diversion, dam or other feature which directly leads to a reliance by the client and subsequent damages are incurred by the client, the surveyor could be held liable. After all, the surveyor is the eyes of the client in most purchases and developments. This would probally be a rare event, but with todays equipment and methods, what's a few more shots? Look for apparent problems and identify the physical evidence so that all affected parties can be informed.

One item not addressed in this chapter, or in this book, is the issue of appropriation of water rights. It deserves mention within the role of the surveyor. Many good reasons have been shown for locating physical obstructions of drainageways. With respect to appropriation, it only need be said that the same obstructions of the drainageways, can also be depriving a downstream landowner the right to use his appropriated water. Some situations may not be damaging to others from a drainage standpoint, but could be damaging to another person if appropriated water were shut off.

Flood plain laws, drainage district laws and local ordinances have not been researched, and may certainly be a factor in any drainage situation. These cases are to be viewed only as general concepts and do not take precedence over statutes or ordinances, however, the abilities of the surveyor as an expert in locating physical features should be utilized on every survey.

(17 Ariz. 339)

GIBSON v. DUNCAN. (No. 1480.)

(Supreme Court of Arizona. Nov. 17, 1915.)

1. WATERS AND WATER COURSES ⟸118 — SURFACE WATERS.

The owner of lower premises is not bound to permit the flow of surface and flood waters over it, but may, by improvements, embankments, etc., prevent the flow from the upper premises.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 128-130; Dec. Dig. ⟸118.]

2. WATERS AND WATER COURSES ⟸124 — SURFACE WATERS—INJUNCTION.

In an action to enjoin defendant, a lower adjoining owner, from constructing embankments which stopped and pooled the surface water on the plaintiff's higher premises, where it was found that the "plaintiff has permitted manure and other filth to accumulate on his premises and to fall onto defendant's lot and walk, and to be washed by the rains onto the walk and premises, plaintiff, not being himself free from fault, was not entitled to enjoin defendant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 142; Dec. Dig. ⟸124.]

3. APPEAL AND ERROR ⟸907—FINDINGS—CONCLUSIVENESS.

Where the evidence taken at the trial was not made a part of the record, the findings of fact must be treated by the Supreme Court as true, and as fully supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2918, 3673, 3674, 3676, 3678; Dec. Dig. ⟸907.]

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Action for injunction by O. Gibson against James F. Duncan. Judgment for defendant, and plaintiff appeals. Affirmed.

O. Gibson, of Tombstone, in pro. per. Lee O. Woolery, of Tombstone, for appellee.

ROSS, C. J.—The appellant was the plaintiff below and the appellee was the defendant. We will speak of them hereafter as plaintiff and defendant. They own and occupy for residential purposes lots in the same block in the city of Tombstone. The natural slope of the ground is such that the surface waters run from plaintiff's premises on to and over the premises of defendant. On the lowest part of his land, and adjoining the land of defendant, plaintiff has a stable and horse lot, over which surface and flood waters were accustomed to run, and, if not interfered with, these waters naturally passed on to and across the premises of defendant. The lat-

ter, shortly before the institution of this action by the plaintiff, for the purpose of preventing the deposition of the manure from the stable and lot of plaintiff upon his land and premises, constructed thereon an embankment or barrier that arrested and pooled the water, and as plaintiff alleges, by reason thereof:

"Manure and other unhealthful substances will accumulate in the pool of water, so impounded, as aforesaid, and cast upon plaintiff's premises in such quantities as to be unsanitary and unhealthful, and as will subject plaintiff to arrest under the ordinances of the city of Tombstone."

The plaintiff prayed that the defendant be restrained from so maintaining the said embankment as to impound and cast waters on his premises. The answer consisted of a general denial and an admission that the defendant had constructed an embankment, as alleged. It seems from the answer, as also the complaint, that the overflow from the plaintiff's premises was upon and over the walk or path used by the defendant as a means of ingress and egress to and from the defendant's home to the street. Defendant alleges that, ever since plaintiff's barn and corral had been constructed, "plaintiff has permitted manure and other filth to accumulate in said corral and to fall on said walk and to be kicked thereon by plaintiff's horses, and to be washed by the rains on to said walk and property of defendant, . . . " and "that in the exercise of his just rights and to keep said walk in a passable condition, and to keep said manure and filth off his premises, he placed boards upon his premises" for protection.

The case was tried to the court. Several findings were made, but the two to which the plaintiff objects are:

"(5) That since plaintiff erected said barn and built said corral and kept a horse or horses therein, plaintiff has permitted manure and other filth to accumulate in said corral and to fall on to said lot 18 of defendant and on to his said walk, and to be washed by the rains on to said walk and property of the defendant.

"(6) That defendant, to keep said walk in a passable condition, and to keep said manure and filth from falling on to his said walk and premises, and from being washed thereon by the rain-waters and waters from melting snows, placed boards on edge upon his own premises, just westerly of said

corral of plaintiff, which said boards hold back the surface waters upon plaintiff's premises, but only such surface waters as have become polluted with manure and other filthy substances from plaintiff's said corral."

He says these findings do not support the judgment, and are evasive and without the issue.

The plaintiff assigns as error the failure of the court to enter judgment for him, as prayed for, upon the findings as made by the court and admissions in the pleadings. This necessarily involves the assumption that the complaint states a good cause of action, and that the answer sets forth no legal grounds of defense. The complaint seems to be drawn upon the idea that, inasmuch as the defendant's premises were lower than the plaintiff's, a duty was imposed by law upon the lower premises to permit the flow of surface and flood waters over the same. In other words, the plaintiff would adopt the civil law which recognized the dominant and servient estates with reference to surface waters. We do not think that to be the law of this state. On the contrary, in *City of Tucson* v. *Dunseath,* 15 Ariz. 355, 139 Pac. 177, we quoted, with approval, from *Walker* v. *New Mex. & S. P. R. Co.*, 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421, the following language:

"One is under no obligation to receive from the other the flow of any surface water, but may, in the ordinary prosecution of his business and in the improvement of his premises, by embankments or otherwise, prevent any portion of the surface water coming from such upper premises."

Plaintiff in his argument seems to concede the above proposition, but seeks to distinguish and modify it in this case, because he says the obstruction placed by defendant upon his premises impounds the water upon the manure and other unsanitary matter on his ground, and thereby makes it unhealthful. In other words, if the effect of defendant's act in building an embankment were to impound only the clear pure surface water, the defendant would be conceded as acting within his rights, but since, by act of plaintiff, the surface waters will become filthy and unwholesome, he would have the lower premises of the defendant burdened with the duty of permitting them to flow freely over the latter's premises. The evidence taken in the case is not made a part of the record; the

plaintiff choosing to rely upon the findings as made by the court. The two findings above quoted, of course, must be treated as true and fully supported by the evidence. The fact, therefore, is that the "plaintiff has permitted manure and other filth to accumulate in said corral and to fall on to said lot 18 of defendant and on to his said walk, and to be washed by the rains on to said walk and property of the defendant."

Before the plaintiff would be entitled to the extraordinary relief asked for, he should clearly show from his complaint that he himself is free from fault; that his own hands are clean.

Judgment is affirmed.

FRANKLIN and CUNNINGHAM, JJ., concur.

On the correlative rights as to the obstruction of the natural flow of surface water, see note in 21 L. R. A. 598.

As to right of owner of lower tenement as against the rights of the upper land owner to obstruct surface water in a natural drainage channel, see note in 22 L. R. A. (N. S.) 789.

SOUTHERN PAC. CO. v. PROEBSTEL.
No. 4574.

Supreme Court of Arizona.
June 30, 1944.

1. Waters and water courses ⇐118, 119(2)
Surface waters may not be obstructed without providing sufficient outlet, and may not be accumulated in large quantities and then conducted through an artificial ditch in a different direction to ultimate discharge upon another's land.

2. Waters and water courses ⇐115
"Surface waters" are waters falling upon and naturally spreading over lands, which may come from seasonal rains, melting snows, swamps, or springs, or from all of them, and consist of surface drainage falling on or flowing from and over land before finding their way into a natural water course.

See Words and Phrases, Permanent Edition, for all other definitions of "Surface Waters".

3. Waters and water courses ⇐38
A "stream" is a water course having a source and terminus, banks and channel, through which waters flow, at least periodically, and usually empty into other streams, lakes, or the ocean, and it does not lose its character by breaking up and disappearing.

See Words and Phrases, Permanent Edition, for all other definitions of "Stream".

4. Waters and water courses ⇐38, 115
Streams are usually formed by surface waters gathering together in one channel and flowing therein, when the waters lose their character as "surface waters" and become "stream waters".

See Words and Phrases, Permanent Edition, for all other definitions of "Stream Waters".

5. Waters and water courses ⇐38
A continuous flow is not necessary to constitute a stream and its waters "stream waters".

6. Waters and water courses ⇐38, 54, 115
"Floodwaters" have broken away from a stream, while "surface waters" have not yet become part of a water course; "floodwaters" are waters which escape from a water course in great volume and flow over adjoining lands in no regular channel, and

their character does not change if they make for themselves a temporary channel or follow some natural channel, gulley or depression.

See Words and Phrases, Permanent Edition, for all other definitions of "Floodwaters".

7. Waters and water courses ⇐54, 115

Floodwaters escaping from a stream are not "surface waters" and do not lose their character as "floodwaters" while flowing wild over the country.

8. Waters and water courses ⇐51, 54, 118

One cannot obstruct the flow of surface waters or a natural water course onto his land, but may protect himself against flood waters by obstructing their flow onto his land, even though such obstruction causes the water to flow on another's land.

9. Waters and water courses ⇐126(2), 179(4)

In action against railroad for land and crop damages caused by construction of dike, evidence established that waters intercepted by dike were not surface waters but floodwaters, and that railroad did not change their natural course nor conduct them by artificial means to plaintiff's land.

10. Waters and water courses ⇐54

Where railroad did not collect waters upon its right of way and discharge them on land, but merely raised its own premises so as to dike against flood waters, damage to crops and land of another from waters thus turned back was not actionable.

Appeal from Superior Court, Yuma County; Henry C. Kelly, Judge.

Action by Clotilda Proebstel against the Southern Pacific Company for land and crop damages caused by a flood. From a judgment for plaintiff, defendant appeals.

Reversed and remanded with directions.

Knapp, Boyle & Thompson, of Tucson (Lawrence L. Howe, of San Francisco, Cal., of counsel), for appellant.

Glenn Copple and Wm. H. Westover, both of Yuma, for appellee.

FAIRES, Superior Judge.—Appellant, Southern Pacific Company, hereinafter called defendant, appeals from a money judgment rendered against it in the Superior Court of Yuma County in favor of appellee, Clotilda Proebstel, hereinafter called plaintiff, for land and crop damages caused by a flood in what is known as Coyote Wash during August of 1941. The action was tried before a jury and at the close of evidence defendant moved for an instructed verdict in its favor, which motion was denied, and thereafter the jury returned its verdict for the plaintiff. Following the entry of judgment for plaintiff the defendant filed its motions to set aside the verdict and for judgment in its favor, together with separate motion for new trial, which motions were denied, following which this appeal was taken.

Plaintiff alleged in her amended complaint that on or about the 25th day of July, 1941, defendant constructed a large ditch south of its line of railroad near Wellton, Arizona, extending about one mile in length from a point on an arroyo commonly known as Coyote Wash south of its railroad, the effect of which so changed the drainage of the surrounding country as to increase the flow of Coyote Wash as it ran near and through her land whenever a heavy rain storm would occur; that as a result of said construction by the defendant far greater quantities of water than would normally flow upon the land of the plaintiff from the wash would be precipitated upon her land. Plaintiff also alleges that subsequent to this construction a great torrent of water swept down Coyote Wash and upon and over her land and destroyed the crops, and so injuring her land as to require re-grading, and that but for the ditch so constructed by defendant none of such damage would have occurred.

Plaintiff's land lies approximately one mile north of Wellton, which town, lying east of Yuma, is intersected by the east-west mainline tracks of defendant, and the paralleling Yuma-Phoenix highway. Plaintiff's land is cut through approximately from south to north by the natural channel of Coyote Wash, which has a general fall of twenty-five feet to the mile. This wash serves as a natural drain for the watershed to the south of Wellton, which embraces 302 square miles. Storm and flood waters of this watershed drain into Coyote Wash, which as a natural watercourse receives and then conducts them in a general northerly direction to Wellton, where they pass under the railroad bridge; thence through a 170 foot highway ditch, and still continuing northerly are then discharged upon plaintiff's land. Coyote Wash extends a distance of approximately 24 miles south of Wellton, and its continuity as a natural watercourse can be followed. Its width varies from 100 to 400 feet, and its depth ranges from three to eight feet. At a point on Coyote Wash just above her cultivated land plaintiff, several years ago, constructed an unreenforced earthwork dike, extending from bank to bank, for the purpose of forcing the waters to flow to the west and by-pass her farm. At least on one occasion prior to the constructing of defendant's dike, and before the litigated flood, her dike had failed to withstand the waters of Coyote Wash, with resulting damage to her downstream farming land. As rebuilt just before the flood, over which this suit arose, plaintiff's dike was in an unfinished state and, according to some of her own witnesses, had not been adequately designed or constructed.

Defendant's dike or embankment, built in July of 1941, is 3,517 feet in length and varies from five to eight feet in height. The southerly tip is more than a mile south of Wellton and from such point it extends

northeasterly to a point on the westerly bank of the main channel of Coyote Wash to a point approximately two miles upstream from plaintiff's dike. In constructing this dike defendant intercepts numerous channels, all of which, within a distance of two miles upstream, stem in a northwesterly direction from Coyote Wash.

On August 9, 1941, following the completion of defendant's dike there was a heavy rainfall in the area south of Wellton, resulting in Coyote Wash reaching flood stage. Defendant's dike intercepted and cast back into Coyote Wash such part of its flow as had escaped from the main channel. When the flood waters of Coyote Wash reached plaintiff's own dike it collapsed and allowed the stream water to come upon plaintiff's land with resulting damage.

This litigated flood was one of a total of three described by the witnesses; the first and largest of these three floods occurred in 1931. While there was conflict in the testimony as to the exact date of the second flood, it occurred about December, 1940, or January-February, 1941.

Defendant does not challenge the amount of the verdict and judgment but confines its attack to the basic proposition that plaintiff failed to establish breach of duty on the part of the defendant, such as would render it liable in damages to the plaintiff.

[1] The exact question here involved in this case is new in this state, and the water law in Arizona furnishes no precedent for this appeal. This court has never been called upon to adjudicate the character of water escaping through or over the banks of a stream, nor to set out what, if any, defensive steps may be employed in halting its invasion. Insofar as the water law of Arizona is concerned, the prohibitions found in the cases adjudicated are against: a. The obstruction of surface waters without provid-

ing sufficient outlet and, b. The accumulation of surface waters in large quantities, followed by its conduct through an artificial ditch in a direction where it never before flowed to ultimate discharge upon the land of another.

It is the defendant's position that the waters in Coyote Wash were flood waters, while it is the contention of plaintiff that they were surface waters. Hence, the vital question for determination here is the character of these waters involved in this litigation. The terms "surface water," "stream water," and "flood water" each differs in fact and has a different significance in law. *Sam Gabriel, etc.*, v. *Los Angeles County*, 182 Cal. 392, 188 Pac. 554, 9 A. L. R. 1200 (cited with approval in *City of Globe* v. *Shute*, 22 Ariz. 280, 196 Pac. 1024, 1027), in which latter case the Court said:

"The distinction between the present case and the decisions cited by counsel for the municipality is well defined. None of these decisions were concerned with the diversion of the waters of a natural stream by means of an insufficiently constructed artificial channel or waterway. They are all cases concerning surface waters."

[2] The distinguishing physical characteristics are aptly defined in *Mogle et al. v. Moore et al.*, 16 Cal. (2d) 1, 104 Pac. (2d) 785, 789.

"Surface waters are defined as waters falling upon and naturally spreading over lands. They may come from seasonal rains, melting snows, swamps or springs, or from all of them. Surface waters consist of surface drainage falling on or flowing from and over a tract or tracts of land before such waters have found their way into a natural watercourse. 26 Cal. Jur. p. 279, and cases cited."

[3-5] While stream waters are not involved in this appeal, it will illuminate the discussion to quote the definition found in *Mogle et al* v. *Moore et al., supra:*

"A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear. (Citing case.) Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters. (Citing cases.) As we have observed, a continuous flow of water is not necessary to constitute a stream and its waters stream waters. (Citing cases.)"

[6] Flood waters are thus correctly described in 26 Cal. Jur. 280, *supra:*

"Flood waters are distinguished from surface waters by the fact that the former have broken away from a stream, while the latter have not yet become part of a watercourse. The term 'flood waters' is used to indicate waters which escape from a watercourse in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as flood waters or give to the course which they follow the character of a natural watercourse."

[7] It is thoroughly settled that flood waters escaping from a stream are not surface waters and do not lose their character as flood waters while flowing wild over the country. In *Horton* v. *Goodenough,* 184 Cal. 451, 194 Pac. 34, 37, it was said:

" . . . The waters are plainly flood waters breaking out of their channel and running wild, and as such each property owner threatened has the right to protect himself against them as best he can, under the authority of the decisions we have already cited, the most notable of which is *Lamb* v. *Reclamation District, supra* (73 Cal. [125] 126, 14 Pac. 625, 2 Am. St. Rep. 775). The waters are not surface waters in the

technical sense, for they have already been gathered into a stream whence they have escaped."

A similar rule is announced in *LeBrun* v. *Richards,* 210 Cal. 308, 291 Pac. 825, 828, 72 A. L. R. 336, with the added remark that "flood waters are those which escape from a stream or other body of water and overflow the adjacent territory."

[8] The rules governing the right to obstruct the flow of the "surface waters" and "flood waters" with which we are here concerned are clearly set forth in *Horton* v. *Goodenough, supra,* as follows:

" . . . First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. *Heier* v. *Krull,* 160 Cal. 441, and authorities therein cited at page 444, 117 Pac. 530. But by 'surface waters' are not meant any waters which may be on or moving across the surface of the land without being collected into a natural watercourse. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural watercourse, but which yet were once a part of a stream and have escaped from it, 'flood waters,' in other words. (Citing cases.) Second, one has the right to protect himself against 'flood waters,' that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. (Citing cases.) Third, one may not obstruct or divert the flow of a natural watercourse. But by a 'watercourse' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow. (Citing cases.)"

Plaintiff testified that the amount of water diverted into Coyote Wash by the construction of the ditch and dike was from forty to fifty per cent of the nor-

mal flow. However, plaintiff does not contend, nor was proof offered, that the water-carrying capacity of Coyote Wash was exceeded, but rested her case upon the allegation that the construction of defendant's dike changed the drainage of the surrounding country as to cause greater drainage into and greater flow of water down Coyote Wash whenever a rain storm would occur. She further alleged that great torrents of water than would normally flow upon the land of plaintiff from the wash were precipitated upon it to her damage.

[9] While the right of one to drain into a water course cannot be challenged, there are conflicting lines of decisions as to whether in so doing he may exceed the storm-carrying capacity. Under the uncontradicted facts contained in the record this court is not called upon to decide which of the divergent doctrines is to be adopted in Arizona. A careful examination of the evidence in the case is convincing that the waters intercepted by defendant's dike were not "surface waters," but "flood waters"; that though obstructing the escaping waters by dike the defendant did not change their natural course; nor did the defendant conduct the waters by artificial means to the plaintiff's premises. *Maricopa County, etc.*, v. *Roosevelt Irr. Dist.*, 39 Ariz. 357, 6 Pac. (2d) 898. A careful examination of the Arizona Irrigation District cases, *Roosevelt Irr. Dist.* v. *Beardsley, etc.*, 36 Ariz. 65, 282 Pac. 937, 939, *Maricopa County, etc.*, v. *Roosevelt Irr. Dist., supra,* demonstrates that this court was not passing upon waters which had broken away from or escaped the main channel of a watercourse, but was dealing with "surface waters." Hence, these cases cannot serve as legal precedent in determining the character of the waters this court is now called upon to consider. In *Roosevelt Irriga-*

tion District v. ***Beardsley, etc.,*** *supra,* Judge McAlister, speaking for the court, said,

"Even though it be true that defendants could have thrown up an embankment and prevented the water from flowing on their premises, this did not authorize them to collect it in an artificial channel and cast it against plaintiff's property, for 'there is a manifest distinction between casting water upon another's land, and preventing the flow of surface water upon your own.' *Barkley* v. *Wilcox,* 86 N. Y. 140, 40 Am. Rep. 519." *Hutchings* v. *Wabash Ry. Co.,* 224 Mo. App. 1124, 33 S. W. (2d) 147; *Gibson* v. *Duncan,* 17 Ariz. 329, 152 Pac. 856.

[10] The defendant in this case has not collected the waters upon its right of way and discharged the same immediately upon plaintiff's land; it has merely raised its own premises so as to dike against and prevent the flow of water thereon. It has protected itself and prevented invasion of its premises of the flood waters of the stream. If, thereby, the waters which are turned back and prevented from flooding over its right of way damage the lands of the plaintiff, the case is one of *damnum absque injuria.* Defendant has done nothing further than to exercise its common law right of protection against flood waters. It is presumed that plaintiff may do the same.

Among the cases cited by plaintiff in her brief from other jurisdictions as controlling is *State* v. *Hiber,* 48 Wyo. 172, 44 Pac. (2d) 1005. This case involved the question whether the impounded flow was "surface waters" or "stream waters." Stream water is not here involved. Another case relied upon by plaintiff, *Los Angeles Cemetery Association* v. *City of Los Angeles,* 103 Cal. 461, 37 Pac. 375, is distinguished in *Sanguinetti* v. *Pock,* 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169, a later California case, by denying applicability, and escaping waters were held to be "flood

waters." See *San Gabriel, etc.*, v. *Los Angeles Co.*, 182 Cal. 392, 188 Pac. 554, 9 A. L. R. 1200. Plaintiff cites and relies upon *LeBrun* v. *Richards, supra,* as authority for the proposition that the escaping waters involved in this appeal were "surface waters." That court in defining surface waters and distinguishing them from flood waters said:

" . . . 'Putting it conversely, they do not include waters flowing out of a natural watercourse, but which yet were once a part of a stream and have escaped from it, "flood waters," in other words. . . . Second, one has the right to protect himself against "flood waters," that is, waters of the character last described, and for that purpose to obstruct their flow on to his land, and this even though such obstruction causes the water to flow on to the land of another. . . . ' "

This same language is restated and adopted in *Mogle* v. *Moore, supra,* which distinguishes the decisions of California dealing with surface waters and those pertaining to flood waters. See also *Poole* v. *Sun Underwriters, etc.*, 65 S. D. 422, 274 N. W. 658, and *Indian Creek Drainage Dist.* v. *Garrott,* 123 Miss. 301, 85 So. 312.

Among other cases cited by plaintiff: *Maricopa County Municipal Water Conservation District, etc.*, v. *Southwest Cotton Company, etc.*, 39 Ariz. 65, 4 Pac. (2d) 369, is not in point for it defines a watercourse and relates to "stream waters." *City of Tucson* v. *Dunseath,* 15 Ariz. 355, 139 Pac. 177, has no application to the facts in this case as it is one clearly involving "surface waters."

Kroeger v. *Twin Butte R. R. Co.*, 14 Ariz. 269, 127 Pac. 735, Ann. Cas. 1914A, 1289, is a case where no defensive dike was involved; nor was any contention made that the intercepted water was other than "surface waters."

In comparing the foregoing cases it must be kept in mind that in the case before us the water which reached the lands of the plaintiff was not conducted there through artificial means, nor was the water discharged immediately upon her premises by the defendant but reached her lands in the bed of a natural watercourse.

On the proposition of law that one whose property is threatened to be invaded by flood can defend against it by the use of ditch or dike, and for any damages resulting therefrom he is not liable if the results of his ditch or dike are merely to augment the flow of a stream constituting natural drainage for the basin wherein the invading water had its origin, the defendant has cited a host of cases from many jurisdictions, including leading cases—*Board of Drainage Com'rs* v. *Board of Drainage Com'rs.*, 130 Miss. 764, 95 So. 75, 28 A. L. R. 1250, *San Gabriel Valley Country Club* v. *Los Angeles Co., supra, Baldwin* v. *Ohio Tp. et al.*, 70 Kan. 102, 78 Pac. 424, 67 L. R. A. 642, 109 Am. St. Rep. 414.

Defendant invokes the rule that where the evidence shows an injury may have resulted from one or several causes but only one of the causes can be attributed to the defendant's negligence, the plaintiff must fail to recover, and this rule is amply supported by the authorities. However, since the case does not turn on this point we will not endeavor to explain or reconcile the evidence bearing upon proximate cause, which is the basis of a number of assignments of error by the defendant.

This case it seems to us is controlled by the majority line of authorities we have mentioned. While it is one of first impression in this state, we cannot see how any other rule could reasonably be adopted in such situation as presented by the facts in this case. Every reason which induced the adoption of the

rule as to flood waters in other jurisdictions applies here. Any other rule would be a hindrance and not a help to settlement and improvement, and does not offend against any of the principles with respect to the obstruction of waters, as heretofore adjudicated by the decisions of this court. Stressing the importance of this case we quote the apt language of counsel for the defendant in the concluding lines of their reply brief.

"The importance of this appeal is not indicated by the size of the judgment. It is a matter of common knowledge that there are countless washes in Arizona whose age, size and idiosyncrasies equal, if not exceed, those of Coyote Wash. The frequency or extent with which they will hereafter overflow or break their banks in time of flood is unpredictable. Their damage will by no means be visited exclusively upon railroad companies. Towns, farms and other interests will be equally jeopardized. The right to guard against overflow or escape water by means of dikes, or to drain back into the stream, must be preserved for all whose property would otherwise be intermittently menaced."

Under the unquestioned facts as disclosed by this record defendant was clearly entitled to a directed verdict at the close of the case for the reasons that it was apparent from all the competent testimony of the witnesses that defendant's dike intercepted and returned to Coyote Wash flood waters, merely increasing the flow of a well-defined and natural watercourse without exceeding the stream-carrying capacity which, in the exercise of its lawful right to protect its own property, it could do; the learned trial judge apparently erroneously concluded that the case was governed by *Maricopa, etc.*, v. *Roosevelt Irr. Dist., supra.*

Learned counsel for both sides have ably presented and briefed the case, thereby materially lessening the labor involved in the preparation of this opinion.

In view of our conclusion that the waters which it is alleged defendant caused to be discharged upon plaintiff's lands were flood waters, and that the rule applicable to such waters, which are a "common enemy," can be invoked by defendant under the facts as shown by the record, plaintiff's judgment cannot be sustained in law, hence the judgment of the trial court is reversed and the case remanded with directions to dismiss the same.

McALISTER, C. J., and ROSS, J., concur.

CITY OF TUCSON v. DUNSEATH. †

(Supreme Court of Arizona. March 10, 1914.)

1. WATERS AND WATER COURSES (§ 116*)—SURFACE WATERS—DOMINANT OR SERVIENT ESTATE.

As a rule there is no dominant or servient estate with respect to surface or rain waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 127; Dec. Dig. § 116.*]

2. WATERS AND WATER COURSES (§ 118*) — SURFACE WATER—EMBANKMENTS.

At common law one may prevent surface water from coming onto his premises from higher land by the erection of embankments, etc., in the improvement of his premises.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 128–130; Dec. Dig. § 118.*]

3. WATERS AND WATER COURSES (§ 157*) — DRAINS IN STREET—CONSENT OF CITY—IMPLIED CONSENT.

Even though one who constructed a ditch in a street for draining surface water is not shown to have obtained the city's permission to do so, its use for some 10 months for that purpose, without objection by the city, would justify a presumption that its consent was secured or that it had ratified its construction by acquiescence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 185; Dec. Dig. § 157.*]

4. MUNICIPAL CORPORATIONS (§ 835*)—TORTS —CASTING SURFACE WATER.

Before plaintiff's lot had been raised so as to be somewhat above the proposed street grade except in the rear, a ditch was dug along the street by another adjacent owner with the city's consent or acquiescence for the purpose of draining away the surface water, and thereafter the city engineer, merely in view of raising the street in the future and not for making a present improvement, dumped waste material in the street so as to make an embankment across the ditch and dam up the surface waters, which were thereby cast on plaintiff's land in a greater volume than they would have naturally flowed thereon. *Held*, that the city was guilty of an actionable wrong in thus impounding waters and casting them upon plaintiff's land.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1785; Dec. Dig. § 835.*]

5. MUNICIPAL CORPORATIONS (§ 751*)—OFFICERS—AUTHORITY.

Where a contract for the improvement of a street authorized the contractor to place the waste material as directed by the city engineer, the engineer's act in directing the contractor to dump it in a certain street, which resulted in stopping up the drain, was the act of the city, since municipal corporations can only act by their servants and agents.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580–1582; Dec. Dig. § 751.*]

6. MUNICIPAL CORPORATIONS (§ 827*)—SURFACE WATERS—DISPOSITION.

Municipal corporations are under the same duties and liabilities as other persons, in the control and disposition of surface waters.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1772–1776; Dec. Dig. § 827.*]

7. Municipal Corporations (§ 745*)—Torts —Liability of City.

A municipal corporation is liable for injuries caused by the negligent or wrongful act of its servants and agents for which it is responsible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1506; Dec. Dig. § 745.*]

8. Waters and Water Courses (§ 126*)—Obstructing Surface Water — Actions for Damage—Instructions.

In an action against a city for damage to property by impounding surface water in a street and casting it upon plaintiff's property, the court instructed that the term "Act of God" applied only to events in nature so extraordinary that the history of climatic conditions in the locality afforded no reasonable warning of them, and liability for injury caused by floods cannot be avoided, on the ground that the flood was an act of God, where it might have been expected, though it occurred infrequently, and that even though the city had caused material to be dumped in the street, yet if the storm which caused the injury to plaintiff's property was so overwhelming in character that it would of itself produce the injury independently of the material, then the jury must find for defendant, and further instructed that, to give a body of water the character of an extraordinary flood, it is not necessary that it should be the greatest flood within memory, but its character should be tested by comparison with the usual volume of floods ordinarily occurring. *Held*, that the instruction as a whole was that, if the storm would have caused the injury to plaintiff's property independent of the obstruction placed in the street, plaintiff could not recover.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.*]

9. Appeal and Error (§ 1047*)—Harmless Error—Rulings on Evidence.

In an action against a city for damage from obstructing a street ditch so as to cause water to gather in the street and be cast on plaintiff's lot, any error in rulings on evidence as to whether the particular rain was extraordinary was harmless, where it appeared that the only outlet it had from the street after it was obstructed was over plaintiff's premises.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146–4152; Dec. Dig. § 1047.*]

Cunningham, J., dissenting.

Appeal from Superior Court, Pima County; Wm. F. Cooper, Judge.

Action by James R. Dunseath against the City of Tucson. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank E. Curley, City Atty., of Tucson, for appellant. John H. Campbell, of Tucson, for appellee.

ROSS, J.—The appellee is the owner of lot 17, block 3, of the city of Tucson. Lots 18, 19, and 20 in same block are owned by one Allen B. Jaynes. All these lots face on First street, and lot 20 is on the west side of Third avenue. Block 3 was a part of the original grant by the United States government to the city of Tucson. It was platted into lots, and First street and Third avenue were dedicated by the city. Extending across block 3 and lots 17, 18, 19, and 20 thereof was a natural swale or depression, the general course of which was southwesterly and northeasterly. This swale reached easterly some distance from block 3, across Third avenue, and across block 2, and into it rain and surface waters gathered and were carried off into First street at a point a little west of lot 17. While block 3 was in this natural condition, appellee and Jaynes purchased the named lots for the purpose of building thereon dwelling-houses. The surface of lots was filled in and raised to about ten inches above the proposed grade of First street; the raised surface extending back and covering and obliterating the swale. Along the east side of lot 20 and the west side of Third avenue and in the avenue, Jaynes, for the purpose of carrying flood or rain water off his property, constructed a ditch from the swale down to First street. He says: "At the time I improved my property, I scooped out a ditch down First street; that is, started on Third avenue. There was a very slight ditch on Third avenue. It was low, anyway, there; we just built up dirt on either side. . . . " This ditch on Third avenue, prior to its being filled and prior to the damage complained of, had been of sufficient capacity to carry off all the water coming down the swale. In April or May, 1910, the city was improving or grading Fourth avenue, and the city engineer caused some of the waste material taken from Fourth avenue to be deposited on Third avenue, extending from First street north about 100 feet. The surface of Third avenue was raised, and the ditch that had been made by Jaynes was filled up so that on July 21, 1910, when it rained, a large body of water was collected, forming a kind of basin. The dirt filled in Third avenue and in the ditch, prevented the water from escaping, as it had done before, down on to First street, and forced it over and across lots 20, 19, and 18 parallel to and about ten feet north of the old depression on to appellee's lot 17, and filled his cellar full of water, destroying and damaging property of the value of $333.50.

The contractor who was making the improvement on Fourth avenue dumped the waste earth on Third avenue under the authority of a stipulation in his contract with the city, to the effect that "all waste material shall be disposed of as directed by the city engineer." The ditch along Third avenue had been constructed and in use for about ten months before it was filled up.

The case was tried before a jury. Verdict and judgment for appellee. The city appeals and assigns fifteen errors based upon the giving and refusing instructions and in the admission and rejection of evidence.

The instructions given, of which complaint is made, were based upon the theory that, if the facts alleged in plaintiff's complaint were true, the city was liable in damages, and the instructions requested by appellant and refused were based upon the theory: (1) That the filling of swale or depression of lots 17, 18, 19, and 20 by Jaynes and appellee did not relieve the premises of the servitude of the surface water theretofore naturally running over and across their premises; (2) that the ditch made by Jaynes to convey the water along Third avenue to First street and away from premises was made without authority, and the city acted within its rights in filling it up; (3) that surface of premises was permitted to remain below the established grade, but for which the injury would not have occurred; (4) that the act of the city engineer and contractor in dumping waste earth on Third avenue was not the act of the city and could not bind the city; and (5) granting that the city had done all the things charged against it, it was acting within the law, and any damages suffered by appellee were only consequential of the exercise of its rights and *damnum absque injuria.*

We will consider the appellant's contentions in the order given. It will be borne in mind that the city sold the premises to appellee and Jaynes for residential purposes. It was apparent that homes could not be built thereon without filling in and leveling up the surface of lots. The right to raise the surface of lots and obliterate the swale or depression extending over them was as clearly implied and understood between the purchasers and seller as if it had been stipulated in the deeds of conveyance. Therefore, in filling in their lots and raising the surface thereof, the purchasers did what

was in the contemplation of the city and what they were authorized to do under the law.

In a broad sense and as a general proposition there is no dominant or servient estate as applied to surface or rain waters.

The doctrine of the respective rights of adjoining owners of realty has been many times before the courts, and, as applied and administered under what is known as the so-called common-law rule, is fairly comprehended and limited by the following quotations:

"One is under no obligation to receive from the other the flow of any surface water, but may, in the ordinary prosecution of his business and in the improvement of his premises, by embankments or otherwise, prevent any portion of surface water coming from such upper premises." *Walker* v. *New Mex. S. P. R. Co.,* 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421.

"The lot of the defendant is in the midst of a populous city. The rule which governs the right to dispose of surface water in agricultural districts does not apply to such property. It is set apart, held, and owned for building purposes. To make it useful for this purpose, the owner has the right to fill it up, elevate it, to ditch it, to construct buildings on it in such a manner as to protect it against the surface water of an adjoining lot. If in so doing he prevents the flow of surface water upon his lot, the owner of the higher lot has no cause of action against him. This is a necessary incident to the ownership of such property. A contrary rule would operate against the advancement and progress of cities and towns and to their injury, and would be against public policy." *Levy* v. *Nash,* 87 Ark. 41, 20 L. R. A., N. S., 155, 112 S. W. 173.

"The owners of lots in cities and towns buy and own with the manifest condition that the natural or existing surface is liable to be changed by the progress of municipal development. All such owners have equal rights neither lessened nor increased by priority of improvement, and the primary right of each owner is to protect himself and his lot from loss or inconvenience from the flow of surface water. The owner at the foot of the slope is under no obligation to allow his lot to continue as a reservoir for the surplus water of the neigh-

borhood. He may shut it out by grading or otherwise, and the fact that thereby he may incidentally increase the flow on the adjoining lot neither makes him answerable in damages nor affects the adjoining owner's right in his turn to shut out the original, plus the increased, flow on his lot. The owner cannot be coerced as to time or manner of improvement by risk of having put upon him the burden of providing for the flow upon others. Some things, of course, he may not do. He may not proceed negligently so as to do unnecessary damage to others. But, so far as he acts upon his right to protect his enjoyment of his own property, any incidental loss to his neighbor is *damnum absque injuria.*" *Reilly* v. *Stephenson,* 222 Pa. 252, 256, 128 Am. St. Rep. 804, 22 L. R. A., N. S., 947, 70 Atl. 1097, 1099.

The rule as announced in the above cases was recognized by this court in *Kroeger* v. *Twin Buttes R. R. Co.,* 14 Ariz. 269, Ann. Cas. 1914A, 1289, 127 Pac. 735.

The effect of the improvements made by appellee and Jaynes, upon the surface water, was to completely change its course from their premises along the drain or ditch on Third avenue. This ditch had been constructed by Jaynes and was in use when appellee began his improvements. Appellee's premises were distant from it the width of Jaynes' three lots and an alley. The suggestion by appellant that the making of this ditch in the street was a trespass, if granted as true, could hardly affect appellee, as he had no part in its construction.

Besides, even though Jaynes had obtained no permission to construct the ditch, its use for some ten months, without any objection on the part of the city, would justify a presumption that he had secured the consent of the city to construct it, or by its silence it had ratified his act. The city, as original owner of the premises and the coterminous streets, was fully aware of the conformation of the land and necessities of the situation, and doubtless willingly acquiesced in what was done by Jaynes toward protecting his premises. It is not claimed that the ditch made by Jaynes in any way interfered with the use by the general public of Third avenue or that the avenue was in any manner injured, while it must be conceded that such disposition of the surface water was not only practicable but of incalculable benefit to all the premises

protected. In *Sheehan* v. *Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462, the court said: "The common-law rule as to liability for the diversion of surface water has been modified in this and other states by the rule that a person must so use his own as not unnecessarily or unreasonably to injure his neighbor. A circumstance to be considered in determining what is reasonable use of one's own land is the amount of benefit to the estate drained or improved, as compared with the amount of injury to the estate on which the burden of the surface water is cast. *Hughes* v. *Anderson*, 68 Ala. 280, 44 Am. Rep. 147. 'But the extent to which any proprietor may go in these and other ways, in incidentally, while improving his own land, turning the surface water of his own land off on the lands of others, must, in each case, be determined by the degree of comparative injury it may produce and relieve.' Ray on Negligence of Imposed Duties, 301. The benefit in this case will be the redeeming of twenty acres of fine agricultural land, and the restoring of this highway, while the injury will be the submerging, for some time in the spring, of an acre or two of such land as is found along the shore of such a lake. It seems to us that the extent to which the common law is thus modified is well expressed in the case of *O'Brien* v. *St. Paul*, 25 Minn. 335, 33 Am. Rep. 470, where it is said: 'It [surface water] has been called a common enemy, which each owner may get rid of as best he may; and some cases, and not a few, indeed, maintain the owner's right to adopt any means he may choose to prevent it coming on his land, or to turn it off from his land, without regard to the consequences which may ensue to others. These cases are founded on an owner's assumed right to do absolutely what he will with his own. This right, however, is somewhat restricted by the maxim that "a man must so use his own as not unnecessarily to do injury to another," a maxim which grows out of the necessities of society, and without which society would be hardly possible. A man's right to use his property is restricted, for instance, to the manner in which such property is ordinarily used.' Again, on page 336, it is said: 'Although we are not prepared to say that in no case can an owner lawfully improve his own land in such a way as to cause the surface waters to flow off in streams upon the land of another, we do not hesitate to say

that he may not turn the water, in destructive currents, upon the adjoining land. . . . From the complaint, there does not appear any necessity, in grading the avenue, to collect the water at the point indicated, nor any difficulty in conducting it off without injury to private property.' This is a reasonable doctrine that takes into consideration all the circumstances of each case. It gives each man the common-law right to improve and enjoy his own property to its fullest extent, but limited by the requirement that he use reasonable care in disposing of surface water, which the common law did not always require him to do. When he has used such reasonable care, he can generally stand on his common-law rights, whether such surface water injures his neighbor or not." *Hume* v. *City of Des Moines,* 146 Iowa, 624, Ann. Cas. 1912B, 904, 29 L. R. A., N. S., 126, 125 N. W. 846.

Appellee and Jaynes had filled in the front of their lots and raised the surface thereof to or slightly above the established grades of First street and Third avenue. This filling on lots 18, 19, and 20 extended some feet north of the swale and entirely obliterated it. Appellee had also filled up and obliterated the swale on his lot 17. Where the water broke over on to the Jaynes premises, the surface was not raised to the proposed grade of the street, but was some higher than the natural surface of the street, so that it formed one of the walls of the basin of water that collected and was precipitated on appellee's premises. That the back end of premises was lower than the proposed grade of Third avenue cannot advantage the appellant, unless that fact, and not the filling in of ditch and Third avenue, caused the damage to appellee. It was not necessary that the entire surface of premises should have been raised to the proposed grade to entitle appellee to protection from negligent and wrongful injury. The action of the city should have been in view of the existing conditions, as were the precautions taken by appellee. If the city had been in the actual prosecution of the improving and grading Third avenue, exercising reasonable care and caution, and the injury had been a mere incident to such work, the appellee would be remediless. *Johnson* v. *White,* 26 R. I. 207, 65 L. R. A. 250, and notes "a" and "b," 58 Atl. 658. But in this case the waste material and earth placed in Third avenue and Jaynes' ditch were not placed

there in pursuance of any definite plan of present improvement, but with a view of future needs in raising the grade of said avenue.

The act of the city engineer in causing the contractor to dump the waste earth in Third avenue was the act of the city. The contract for the improvement of Fourth avenue authorized the contractor to place the waste (within certain limits) as directed by the engineer. The engineer, acting within the authority given him, was performing and acting for the city, and his acts were the city's acts. Municipal corporations, like other corporations, can act only by their servants and agents. 28 Cyc. 1269.

We are now brought to the main question, as to whether the city, in any event and in view of all the facts, is liable in damages to appellee. Municipal corporations in the control and disposition of surface waters are bound by the same rule as are private persons. Gould on Waters, section 272, says: "Cities and towns have no greater rights than individuals to collect in artificial channels, upon their streets and highways, mere surface waters, distributed in rain and snow over large districts, and precipitate it upon the premises of private owners, or to construct ditches upon private lands for public uses without compensation. A municipal corporation is liable for throwing water, collected in large quantities in a street, or in a gutter of a street, upon the land of a private owner." *Jordan* v. *Benwood,* 42 W. Va. 312, 57 Am. St. Rep. 859, 36 L. R. A. 519, 26 S. E. 266.

In the performance of administrative acts, the rule almost universally accepted at the present time is that a municipal corporation is liable for injuries caused by negligent or wrongful acts of its servants and agents, for which it is responsible.

Now, while the surface waters formerly followed the natural depression over appellee's premises, acting within their rights in grading and improving their lands, another depression, artificial, it is true, but natural in its uses, was made through which such waters escaped, much to the benefit of the premises, with no apparent or claimed injury to the city. The improvement of urban property necessarily works changes in the conformation of the surface ground, and what to-day may be the natural channel of drainage, to-morrow

may be occupied by buildings. As was said in *Larrabee* v. *Cloverdale,* 131 Cal. 96, 63 Pac. 143: "And this, on principle, must be the true construction of the term 'natural channel,' when used in the present connection. For, by the necessarily great changes that must occur in the conformation of the country in the building of a city, the natural channels for the surface water are changed; and as the changes in the ground are inevitable and legitimate, and therefore natural, the new channels, through which, under natural laws, the surface waters are discharged, must also be regarded as natural."

Without doubt the city had the same rights to improve its streets as appellee had to improve his property. To that end it could have raised the surface of Third avenue to the established grade and adopted means and plans to protect it from the surface waters brought upon it. The waste material that it dumped on Third avenue was not for present use, but for use some time in the future in grading the avenue and raising its surface. It was in preparation for contemplated work. It did not keep the water from the avenue, but impounded it on the avenue in a basin or reservoir from which it was precipitated on to appellee's premises in a greater volume and with added force. It made an embankment across the channel through which the surface waters had naturally passed for almost a year. It knew, or could have known by ordinary care, that the embankment made by it would deflect and precipitate the waters onto appellee's premises. Failing to provide an outlet made necessary by its own acts, it is guilty of an actionable wrong. *City of Evansville* v. *Decker,* 84 Ind. 325, 43 Am. Rep. 86; *Valparaiso* v. *Kyes,* 30 Ind. App. 447, 66 N. E. 175; *Weis* v. *City of Madison,* 75 Ind. 241, 39 Am. Rep. 135.

The annotator to *Johnson* v. *White,* II, note, "b," 65 L. R. A. 262, says: "Notwithstanding the difference of opinion as to liability for changing the course of drainage, there is practical unanimity in holding that the water cannot be gathered up and cast in a body on the adjoining property"—and cites a long list of cases sustaining the principle announced.

The refusal of the court to instruct on the theory of the nonliability of appellant, as contended for by it, was not

error. The instructions given properly submitted the issue of negligence to the jury.

One of the defenses of the appellant was that the damage that plaintiff sustained by reason of the flooding of his premises "was approximately caused by said sudden, violent, extraordinary, unforeseen, and unanticipated storm of rain." Upon this issue the court gave the following instructions:

"The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality afford no reasonable warning of them; and liability for injury occasioned by floods of water, where liability would otherwise attach, cannot be avoided on the ground that the flood was an act of God, where, from the climatic and geographical conditions, the flood might have been expected, though it occurred infrequently."

"You are further instructed that even though the city had caused the earth and other material to be dumped on Third avenue at the point alleged in plaintiff's complaint and testified to in this action, yet if you should further find that the storm that is alleged to have caused the injury to plaintiff's property was so overwhelming in character that it would, of itself, produce the injury complained of, independently of the said earth and other material, then your verdict must be for the defendant."

"The jury are instructed that, to give a stream or body of water the character of an extraordinary flood, it is not necessary that it should be the greatest flood within memory. Its character in this respect is to be tested by comparison with the usual volume of floods ordinarily occurring."

The appellant complains of the first and last subdivision of these instructions and insists that they do not state the law and are contradictory. Admitting the point made, yet we think, when the whole language on that question is construed and analyzed, the thought conveyed to the jury was that, if the storm would have caused the injury independent of the obstruction placed in Third avenue, the verdict should be for appellant. In other instructions the jury were told that before they would be authorized to return a verdict for the plaintiff, they must find, by a preponderance of the evi-

dence, that the injury was caused by the obstruction placed on Third avenue by appellant.

The evidence is that the rainfall for two hours was 1.35 inches. The appellant asked questions of witnesses as to whether such amount of rain was extraordinary or not. It complains that the court erred in sustaining an objection to the witness answering the question. Witnesses were permitted to state, over objection by appellant, that other rains previous and subsequent to July 21, 1910, were extraordinary, without giving the duration of the fall. Of this evidence complaint is made. As we view the facts in the case, the character of the rain, whether ordinary or extraordinary, can have little bearing, since, whatever its character, it had but one outlet, and that outlet was over appellee's premises. The evidence showed that other rains of equal or greater volume before the obstruction of Third avenue had passed down that avenue on to First street and not on to appellee's premises.

Judgment affirmed.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J., Dissenting.—I agree with the propositions of law supported by the authorities cited in the majority opinion to the effect that the common-law rule applicable to the flow of surface rain-water is in effect in this state, and as a consequence the owner of lands may improve the same without liability to answer in damages for injuries resulting to adjoining premises from the change of the flow of surface waters caused incidentally by, and as a consequence of, the improvements made. Within this principle of law, a railroad company may throw up embankments for a roadbed upon its right of way, even though the embankment may incidentally impede the flow of surface water from the adjoining premises and cause such waters to be thrown back upon the said premises to their injury, as held in *Walker* v. *New Mexico S. P. R. R. Co.*, 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421. The owner has the right to fill in his premises, and elevate the surface, or to ditch the premises, and to construct buildings upon his lands in such a manner as to protect the lands against the flow of surface water from

the adjoining lot, as held in *Levy* v. *Nash*, 87 Ark. 41, 20 L. R. A., N. S., 155, 112 S. W. 173, and he has the right to shut out the flow of surface water by grading or otherwise, without regard to whether his improvements, made for the purposes, incidentally increases the flow on the adjoining lot, as held in *Reilly* v. *Stephenson*, 222 Pa. 252, 70 Atl. 1097. And the owner, this appellant, has the right to improve its street by depositing suitable dirt therein for the purpose of raising the surface of the street up to an approved level or grade, without having to answer in damages for injuries resulting to an adjoining owner from a flow of surface water, the natural flow of which was incidentally changed by and as a consequence of such street improvements, as the facts in this case show. The above authorities amply support this right.

In all cases the owner must so exercise his rights mentioned, as in making all improvements, restricted by that other well-recognized maxim of law, namely: "That every man must so use his own as not unnecessarily to do injury to another." This rule was applied by us in *Kroeger* v. *Twin Buttes R. R. Co.*, 14 Ariz. 269, Ann. Cas. 1914A, 1289, 127 Pac. 735, where we held in effect the facts stated in the complaint *prima facie* show that the defendant had failed to so use its property.

The restriction is recognized in *Sheehan* v. *Flynn*, 59 Minn. 439, 26 L. R. A. 632, 61 N. W. 462, *Hughes* v. *Anderson*, 68 Ala. 280, 44 Am. Rep. 147, Ray on Negligence of Imposed Duties, 301, *O'Brien* v. *St. Paul*, 25 Minn. 335, 33 Am. Rep. 470, and in *Hume* v. *City of Des Moines*, 146 Iowa, 624, Ann. Cas. 1912B, 904, 29 L. R. A., N. S., 126, 125 N. W. 846, cited by the majority opinion. Many other authorities may be cited to the same effect. In all the cases cited the principle is applied to the case in which the improvements complained of were made on and within the limits of the lands improved, and it could be applied to no other conditions than such as involve improvements upon the owner's lands. As a consequence, the city alone can claim the right to improve its streets, and can be called upon to answer for damages only when it has made such improvements in such a manner as the plaintiff's premises have been unnecessarily injured. The city is not required to respond in damages for

such injuries as incidentally result from the improvements lawfully made, in a reasonably proper manner. *Johnson* v. *White*, 26 R. I. 207, 65 L. R. A. 250, 58 Atl. 658. The same rules of law would apply to Jaynes and Dunseath while making improvements upon their property.

It is clear that the city, as shown in this record, had the lawful right to deposit earth upon the street to an amount sufficient to raise the surface to the grade level adopted by the city. The plaintiff purchased his lots chargeable with facts sufficient to put him on notice of the grade level adopted for North Third avenue. Plaintiff graded his lot with reference to the grade of the street upon which his lot abutted. The grade of the street was located from a datum station at North Third avenue. He is in no position to complain that, when he purchased his property, he was misled by the natural conditions, and these conditions have been changed to his disadvantage by the city grading the street to the approved level.

In the building up of a city the natural channels for surface water are changed, and as changes in the ground are inevitable and legitimate, and therefore natural, the new channels through which, under natural laws, the surface waters are discharged must also be regarded as natural, as held in *Larrabee* v. *Cloverdale*, 131 Cal. 96, 63 Pac. 143. I have found no authority holding that a land owner may go upon adjoining lands and make improvements, such as a drain, thereon for the purpose of protecting his premises from the natural flow of surface water, and such drain, made under such circumstances, has been held to be a natural channel for surface water flow and discharge. No such authority exists. Such drain may become a natural channel under certain conditions, but those conditions are not present in this case. The land owner acquires rights to maintain such drain made by him on the lands of an adjoining owner from some other source and by some other right than because it is a natural channel. The principle referred to in *Larrabee* v. *Cloverdale, supra*, is directly beneficial to the city. When it has lawfully made the improvements upon its street, by depositing earth therein, it changes, by such improvement, the surface ground, and therefore the changes are natural, and the new channels through which, under natural laws, the

surface waters are discharged must also be regarded as natural channels. The natural channel, therefore, was that followed by the surface water through Jaynes' back yard, over the alley and on to plaintiff's premises. So considered, the city owed plaintiff no duty to protect his premises from such flow of surface water. It was plaintiff's duty or privilege to fight this surface water flow as a common enemy, with such means as he may choose. And this is the common-law rule applicable to such cases.

The majority opinion holds that the earth placed in the street by the city served to impound the surface water, causing it to form in a basin or reservoir, from which the water was precipitated on appellee's premises in a greater volume and with added force. The complaint alleges that "defendant caused to be dumped and piled earth and material at and near the intersection of said East First street and North Third avenue, for a distance of about 100 feet northerly, from said intersection, which said earth and material was so carelessly and negligently dumped and piled and maintained on said North Third avenue, and at the intersection of said avenue and said East First street, that the ditch on and along said Third avenue was entirely obstructed, and the waters flowing from said block 2 at times of rain were diverted from flowing into said East First street, and prevented by said dumps and piles of earth and material from flowing to and along said East First street; and the defendant negligently failed to provide any outlet for said water, so that the same collected behind said dumps and piles of earth and material, and was caused by said dumps and piles of material, so placed and maintained by defendant, to flow over and upon and into the premises of the plaintiff." This allegation does not justify the holding that the water was caused to flow on to appellee's premises "in a greater volume and with added force." No such claim is made by the appellee in his complaint. The claim is made that the dumps and piles of earth diverted the flow of water, and caused it to flow over and upon and into his premises. I can discern a material difference between an act that impounds surface water into a basin or reservoir, and causes it to flow in greater volume and with added force, and one that diverts the natural flow of water. The act that impounds surface water into a basin

or reservoir in destructive quantities, where the material impounding is negligently left in a weakened condition insufficient to withstand the natural strain upon it, and the walls of the basin give way, and the water escapes upon adjoining premises in destructive quantities, or when the owner by his improvements negligently impounds surface water, and provides no outlet, which causes the water to flow on to adjoining premises when it would not otherwise have flowed, in either instance the results being the same, the owner would be liable to the same extent as though he had intentionally constructed an artificial channel and purposely turned the water on to the adjoining premises. The wrong consists in the negligent impounding of the water, not in the making of the lawful improvements.

The complaint makes the negligent and careless manner of making the improvements the cause of the damage, and not the impounding of the surface water. The complaint avers that the surface waters flowing from block 2 were diverted by the improvements on the street, and caused to flow on to plaintiff's lands, causing the damage. Where the improvements so diverting the flow of the surface water were negligently and carelessly made, hence the damages, a very different cause is relied upon by the plaintiff for recovery than is assigned by the majority opinion as a right to a recovery. The evidence upon this point is conclusive of the theory upon which plaintiff relied for a recovery. Witness Jaynes for the plaintiff states as his evidence: "When they dumped the dirt on Third avenue, it did fill up my ditch. We had a sort of a drain, a little ditch in there, and that dirt—the dirt was thrown up there so that it just turned that water. The point of the dirt instead of draining the water this way (indicating) had turned it toward my yard, just the peculiar way it was dumped in there. I did not notice at the time that would be the effect of it, but it happened. This ditch . . . caused the water that was coming down this wash to come south of the way it originally traveled, some 35 or 40 feet, and then carried along First street." The plaintiff denied all knowledge of the conditions upon Third avenue. It was his opinion that the street was not filled up to the level of Jaynes' lots. He claims no interest in what was being done on that street. He stated: "I had no interest in touching

anything on Third street [corrected by him to Third avenue]. I had provided for the protection of my property in the first place." No other evidence appears in the abstract of the record upon this point. There is no evidence in the record from which can be drawn the inference that the piles of earth resulted in impounding the water into a basin or reservoir, from which it flowed on to appellee's premises; but, on the other hand, there is the above positive evidence, uncontradicted in any part of the testimony, that the earth served to divert the flow of the surface water from its course along the ditch made by Jaynes to the appellee's premises.

It is clear that the plaintiffs relied upon the negligence of the city in making improvements upon the street, and the negligence relied upon was the failure of the city to furnish a drain for the flow of surface water coming on to North Third avenue from block 2, so as to prevent such surface water from reaching his premises. In other words, the plaintiff seeks to maintain his right to be protected from the flow of surface water, naturally falling upon adjoining premises, by requiring the owner of such adjoining premises to so make improvements that such improvements will not interfere with the natural flow of surface water. Prevent, as it were, an owner of adjoining lands from making such changes in the surface of his lands as will change the natural flow of surface water over such lands. This position, if maintained, would charge the upper lands with a servitude to the lower lands, which is not recognized under the common-law rule, as is well established. The position is squarely within the civil-law rule, which is not recognized in this jurisdiction. Let us suppose that plaintiff could invoke such rule, then, as the evidence in the case shows, the alley lying along the east side of his lots belongs to the city, and, before Jaynes or plaintiff improved their lots, a depression ran over Jaynes' lots, over the alley and over the plaintiff's lots. By the rule that requires the city to control the flow of surface water on North Third avenue, and prevent it from flowing over adjoining premises to their injury, by this same rule, plaintiff could require the city to prevent the surface water from flowing from its alley on to his premises, or else pay damages. Plaintiff could make ditches and embankments on defendant's alley and recover the cost from defendant. No such rule is recognized in this state. For these reasons I am unable to concur in the majority opinion.

The complaint fails to state a cause of action, and the judgment should be vacated and cause dismissed.

Application for rehearing denied.

NOTE.—The question of municipal liability for injury by embankment in street is treated in note in 20 L. R. A., N. S., 626.